IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

STERLING D. BROWN,
Plaintiff,
v. Civil Action No. 2:18-cv-922

City of Milwaukee, et al.
Defendants.

PLAINTIFF'S REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION TO STRIKE

Sterling Brown has now spent nearly one and half years litigating this case to prove that his rights were violated by the City of Milwaukee, its police department and its officers. Discovery has revealed that, regardless of Mr. Brown's efforts, the Defendants have nearly always known this to be the case. Their testimony documents that shortly after Mr. Brown was unlawfully stopped, subject to racist language, beaten and then subsequently tasered in a parking lot, the Defendants knew that Mr. Brown had done nothing wrong and that their own conduct had caused the entire event to unfold. Plaintiff's motion argues that, in light of this information, Defendants' Rule 68 Offer of Judgment is a sham because the costs of litigating this case were unnecessarily inflated by Defendants' dilatory tactics. In response, Defendants do not dispute the factual bases of Plaintiff's motion. Defendants' silence speaks volumes. Defendants specifically do not dispute:

1. Discovery unveiled that the Defendants *knew* they were responsible for a malicious invasion into Mr. Brown's constitutional rights just after the incident took place;
2. The Defendant officers were trained by the City of Milwaukee that their conduct caused Sterling Brown's civil rights to be violated *before* filing their answer;
3. The Defendants were aware of their culpability for this incident, yet still waited for months *after* news of the incident broke to produce the exculpating body camera footage to Mr. Brown;
4. That when the Defendants filed their answer denying liability and blaming Mr. Brown, they actually knew they were in the wrong;
5. Defendant Police Chief Alfonso Morales is responsible for the unlawful spoliation of evidence; and
6. Defendants covered their tracks and violated policy in how they prepared the relevant police reports subsequent this incident and even manipulated one report, in the case of Defendant Grams, in order to improperly cast blame for the incident on Mr. Brown.

In sum, there is no major dispute over what happened in this case. In their response, the Defendants acknowledge their wrongdoing by way of silence. They have not contested any of the bombshell revelations set forth in Plaintiff's motion to strike. Thus, the protracted litigation was simply unnecessary, yet Defendants continue to refuse to formally admit in this proceeding that they are liable. As a result, litigation costs will continue to skyrocket.

There is one simple conclusion to reach in light of all of this: the offer of Judgment is little more than a manipulation of procedure which—if not stricken—will serve only to chill efforts to vindicate individuals civil rights, like here where Mr. Brown seeks redress of what we now know are knowing violations of his constitutional rights. Finally, contrary to Defendants' assertions, Plaintiff distinguished the holding in *Wilder Chiropractic, Inc. v. Pizza Hut of S. Wis., Inc*,. 754 F.Supp. 2d 1009 (W.D. Wis. 2010) and offered the appropriate grounds sufficient to support this motion. See Dkt. No. 59 at 28-29, n. 14.

Argument

I. Defendants do not dispute that their conduct unnecessarily delayed litigation and increased the costs of this case.

Mr. Brown's motion to strike is based upon a simple premise: the relevant offer of judgment is a sham that covers the value of litigation that the Defendants have unnecessarily created. As Mr. Brown's motion and opening brief set forth, the Defendants know they are responsible for violating Mr. Brown's rights and causing him harm, and have unnecessarily ballooned the price of litigation, all at Mr. Brown's and the taxpayers' expense.

None of this was truly disputed by Defendants in response.[1] Perhaps this is unsurprising, as their testimony has been damning at best. Although more fully

[1] On two occasions their brief claims "Defendants have made no admission of liability," yet they do not dispute any of the facts in Plaintiffs' brief, or offer any support for this argument.

documented in Plaintiff's opening brief, the testimony from the defendants demonstrates they understood they violated Mr. Brown's rights.

Defendants admit that Mr. Brown had the right to simply receive a parking ticket and then leave the scene without further incident:

> **Q: Do you agree that Mr. Brown as a citizen had the right to simply get a ticket and not be threatened with handcuffing?**
> **…**
> **A: Yes.**

Dkt. No. 60-5 at 47.

They admit that Defendant officers were instructed by the City of Milwaukee that there was never any reason to touch Mr. Brown and that Mr. Brown was subject to language that could be perceived as racist:

> Q: [T]here was no basis for [Grams] to touch Mr. Brown, correct?
>
> A: I don't remember exactly what [Milwaukee Police Department instructors] said, but that was discussed, yes.
>
> Q: Then you said it was language used. For example, when Mr. Grams says "I own this," they pointed out that was inappropriate, correct?
>
> A: Yes.
>
> **Q: And they specifically pointed out the racist overtones of the… statement, correct?**
>
> **A: Yes.**

Dkt. 60-3 at 41.

They admitted that they were instructed by the City of Milwaukee that Mr. Brown was subject to unlawful excessive force:

Q: We've just gone through several items that were specifically identified as unreasonable uses of force. Correct?

A: Yes.

Q: Certainly that doesn't inspire or sustain confidence in our community. Does it?

A: No.

Dkt. No. 60-5 at 41.

They admitted they failed to intervene when Mr. Brown's rights were being violated:

Q: You agree that per the code, you should have intervened and told Collins to get his foot off of Mr. Brown, correct?

A: Yes, sir.

Dkt. No. 60-2 at 68. They even admitted that they knowingly ignore instructions on how to apply force on civilians, and instead, ostensibly do whatever they want on the streets of Milwaukee:

A: The instructors at the academy haven't seen the street in who knows how many years. They teach textbook classroom [defense and arrest tactics] instruction. I would say 99 percent of the time on the street [those tactics are] not applied textbook classroom style.

Dkt. No. 60-5 at 54.

Defendants understand that they had no reasonable suspicion of Mr. Brown at the time the relevant events unfolded. Dkt. No. 60-2 at 42, 46; Dkt. No. 60-4 at 49, 50, Dkt. No. 60-3 at 54, 55. Defendants know that there was no reason whatsoever to ever arrest Mr. Brown. Dkt. No. 60-2 at 44. Defendant Grams is now just inventing excuses for why he behaved so violently in the Walgreens parking lot. Dkt. No. 60-10 at 120-121. Even the other officers find these excuses incredulous. Dkt. No. 60-5 at 11. Defendant Collins

bluntly admitted "I don't believe [Defendant Grams] had the knowledge that [Mr. Brown] was actually trying to commit a crime." *Id.* The City of Milwaukee specifically instructed these officers that their conduct was insufficient and in violation of Mr. Brown's rights. And now Defendants offer no counter-factual, no other proposed understanding of the facts. They have thus acquiesced to the truth. Yet, the City of Milwaukee still denies its liability, and has been forcing Mr. Brown to litigate this case to resolve a dispute that all parties seemingly acknowledge is at this point undisputable.

Beyond the substantive facts at the heart of the dispute, the Defendants have also seemingly acquiesced to the truth of their misconduct in preparation for litigation. As Plaintiffs set forth in their opening brief, Defendant Police Chief Alfonso Morales failed to preserve evidence even when specifically requested to do so by the Plaintiffs. Dkt. No. 59 at 19. Regardless of this request, Defendant Police Chief Morales took no effort to actually preserve relevant evidence and it was subsequently destroyed. *Id.* at 20. Defendants mustered no attempt to rebut or deny this set of facts. Instead Defendants shrugged at this violation of the law and made no effort to defend this conduct by the City's highest ranking officer. Thus they are ostensibly admitting that the Defendant Police Chief of the City of Milwaukee is responsible for the destruction of highly probative evidence which could have furthered Mr. Brown's ability to prosecute his case.

Defendants did not even make a passing attempt at disputing any of these admissions. Their response to Mr. Brown's motion ignores all of this, leaving it ostensibly conceded. This begs obvious questions—what are we doing here? Why are the Defendants embracing recalcitrance in the face of overwhelming evidence—evidence

which they do not even dispute before this Court? The only conclusion is that the Defendants are comfortable with their contortion of the process, or believe that they will simply get away with it. Under the now undisputed facts such a result simply cannot stand.

It seems that Defendants are simply interested in continuing this pattern of practice in their latest sham offer of judgment. Enough is enough.

II. The cases cited by the Defendant are easily distinguishable. Other cases show that the value of Defendants' offer was effectively nil.

Defendants cited a litany of cases to suggest that its offer was somehow reasonable. None of them are truly applicable in this matter. None of the cases they cited involve any of the incredible facts at issue here. None of the cases involve a clear cover-up of a knowing civil rights violation. None of the cases involve a municipality sitting on exculpating evidence for months as the plaintiff's reputation is maligned and damaged on social media and elsewhere. None of the cases consider offers of judgment that were made after discovery revealed that the Defendants had known of their culpability since well *before* the relevant lawsuits were even filed.

Indeed, other cases suggest that the Defendants' sham offer is dwarfed by the true value of Mr. Brown's case.

Constitutional rights are valued by the people of our country. This is of course true here in the City of Milwaukee and is reflected in decisions of this District. In 2015, two Milwaukee Police Department ("MPD") officers unlawfully stopped and frisked and unlawfully arrested Leo Hardy. *Hardy v. City of Milwaukee*, 88 F. Supp. 3d 852, 856-57

(E.D. Wis. 2015). Fearing for his life, Hardy unsuccessfully attempted to flee. *Id*. at 872. Afterward, the City placed both officers on leave for their illegal conduct. While on leave, one officer posted on social media that he would "not hesitate to go right back to doing exactly what [he] was doing before." *Id*. at 864. Further, the suspended officers attended meetings to attempt to cover up and avoid liability for their illegal conduct. *Id*. At trial, the jury determined that the MPD officers lacked both reasonable suspicion of a crime to stop and frisk Hardy and probable cause (even after Hardy's flight) to detain Hardy. *Id*. at 857.

Critically, *Hardy* demonstrates the punitive damage exposure that the City of Milwaukee faces. In *Hardy* the Eastern District explained the standard to award punitive damages in a § 1983 action: punitive damages are available if the officers acted with evil intent or callous indifference to the plaintiff's constitutional rights. *Id*. at 859-60. Accordingly, the jury awarded the *Hardy* plaintiff $500,000 in punitive damages--$250,000 against each Milwaukee officer involved. *Id*.[2] Citing the deaths of Dontre Hamilton, Eric Garner, and Michael Brown, the Eastern District noted that any "routine police stop has the possibility of escalating quickly." *Id*. at 881. Obviously, this is precisely the conduct that is at issue here.

Milwaukee is not alone in the Seventh Circuit with respect to racist police practices. In *Adams v. City of Chicago*, a jury awarded three young, African-American Chicago citizens $3.7 million in total, after Chicago police unlawfully stopped, detained,

[2]This award was subsequently reduced by order of the Court for insufficient corresponding compensatory damages. This will not be an issue for Mr. Brown.

and punched and kicked the three citizens. *Adams v. City of Chicago*, 789 F.3d 539, 541-45 (7th Cir. 2015). Physically, the Adamses suffered cuts, bruises, and swelling on their faces and bodies. *Id*. at 544. Emotionally, the Adamses became paranoid and "not as trusting or as free-hearted" as before the encounter. *Id*.

It is not hard to draw lines of comparison from *Adams* and *Hardy* to Mr. Brown.[3] Perhaps the only difference is that here, the facts are more egregious. Mr. Brown was not attacked by two officers, like the *Hardy* plaintiff. Here, there were eight, including the sergeants. Similarly, Mr. Brown was not just punched, detained, stopped, and kicked. He was also held down on the cold pavement and tased with his back turned.

[3] Also, the City is certainly aware of the jury verdict in *Greenaway et al v. County of Nassau et al*, Civil Case No. 2:11-cv-02024, EDNY. There, a jury awarded $7,500,000 in compensatory damages for excessive force to a plaintiff who was tasered four times after a 20-45 peaceful conversation with police officers. This award came even though defendants contended the physical injuries from the taser were "de minimis." The Court may take judicial notice of this; also see *Greenaway et al v. County of Nassau et al*, Civil Case No. 2:11-cv-02024, EDNY, Dkt. Nos. 46-3 at 9, and 131 at 8; also Keshner, Andrew *Long Island Man awarded $8.3M after cops repeatedly use stun gun on him*, NEW YORK DAILY NEWS, May 23, 2017, available at https://www.nydailynews.com/new-york/man-awarded-8-3m-cops-repeated-stun-gun-article-1.3187915 .

The Defendants have admitted their conduct caused Mr. Brown's civil rights to be violated. As such, a sham offer of judgment that mostly covers the value of litigation that the Defendants unnecessarily hoisted upon Mr. Brown does not begin to redress the intentional and callous indifference causing harm by the Defendants.

III. Defendants other arguments in opposition to Plaintiff's motion fail.

Defendants have not provided any sufficient reason to ignore their own conduct and refrain from striking their sham offer of judgment. Each argument they have offered is easily dismissed.

Defendants first contend that the motion should be denied because it "does not point to a rule or statute" authorizing the motion. This is not true. Plaintiff clearly identifies that Defendants Rule 68 offer of judgment violates public policy as well as the purpose of Rules 68 and 1. Dkt. No. 69 at 24-30. Indeed, the language from the Supreme Court of the United States is clear that principles of inherent fairness are upset by sham offers such as the pendant one. *Delta Air Lines v. August*, 450 U.S. 346, 356, 101 S. Ct. 1146, 1152, 67 L.Ed.2d 287, 295 (1981). This was all cited clearly in Plaintiff's initial moving papers. Correspondingly it is simply not true that there is no identification of a rule or principle upon which this motion was filed.

Next, Defendants argue that the relief requested cannot be granted. Dkt. 63 at 2. Their argument is that there is nothing for the court to strike at this moment. Yet, the inherent authority of a district court is quite broad. Indeed, "a district court may impose sanctions under its inherent authority where a party has willfully abused the judicial process or otherwise conducted litigation in bad faith." *Fuery v. City of Chi.*, 900 F.3d 450, 463 (7th

Cir. 2018)(internal quotations omitted)(quoting *Tucker v. Williams*, 682 F.3d 654, 661-62 (7th Cir. 2012). Thus, where such as here, the Defendants have manipulated procedure to such an egregious extent the Court is vested with the power to step in and dole out appropriate relief. Under the circumstances, and these egregious facts, striking a sham offer of judgment is well within the broad inherent authority of this Court.

Next Defendants argue that because Plaintiffs have not yet filed either 1) a motion under Rule 11, or 2) a motion to strike their Answer, that therefore, somehow, the pending motion to strike the offer of judgment is meritless. Dkt. 63 at 2-3. This argument is not fully developed by the Defendants, but needless to say, Mr. Brown is leaving all options on the table.

Defendants also contend that they "do not control the Plaintiff's litigation strategy," and that therefore they should not be considered in any way responsible for the fact that Plaintiff has zealously prosecuted his claim thus far. This argument is dubious. It suggests that Plaintiff should somehow be blamed for doing everything in his power to protect the rights enshrined to him under the Constitution. This argument carries no weight. If Defendants insist on disputing their culpability, even though they admitted all the pertinent allegations in their depositions, Plaintiff will do everything necessary within the boundaries of the rules of procedure to overcome Defendants' obstinance and protect his and his fellow citizens' rights to be free of racial applications of excessive force.

Next, Defendants claim their offer suffices because they can simply do whatever they want. Dkt. 63 at 3. As they have it, "the City can provide whatever terms it likes in

its offer." *Id.* Of course this is facially true—the Defendants are drafting the offer and they have the ability to write the offer as they see fit.[4] Yet this does not necessarily mean that an egregious manipulation of process codified in an offer of judgment will not run afoul of the law. This is precisely the case here.

Conclusion

For the foregoing reasons, and those stated in Plaintiff's brief in chief, Plaintiff respectfully requests that the Defendant's Offer of Judgment be stricken, or otherwise ordered invalid under this Court's inherent authority.

Dated at Milwaukee, Wisconsin this 27th day of November, 2019.

Respectfully Submitted:
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[4] It is not known to the Plaintiffs which particular Defendant drafted the offer.